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create a substantive right in the beneficiary by becoming part of every local contract,¹³ whereas the Florida statute is procedural, applicable only to suits in Florida courts.¹⁴ Just how this distinction bears on the ultimate issue is open to question, because state characterization of its own statute as substantive or procedural for conflict of laws purposes does not bind the federal courts on the question of constitutionality.¹⁵ If the effect of its application is to give the *lex fori* unwarranted control over foreign contracts in disregard of the *lex loci contractus*, the statute may be deemed unconstitutional when used in that manner.¹⁶ Some control is tolerated, depending on the forum's interest in the subject matter of the contract,¹⁷ but the mere fact that one of the litigants is a citizen of that state, as in the instant case, does not constitute sufficient interest to warrant such extraterritorial power.¹⁸

It becomes apparent then, that characterization by the state court of the Florida penalty statute as procedural does not circumvent the rule in the *Dunken* case on the basis that the Texas statute was substantive, because the effect in both instances is exactly the same,—the foreign insurer would be subjected to forum penalties which were not assessable in the state where the contract was executed. Thus, agreeing with the dissent,¹⁹ it is submitted that the holding in the instant case is directly opposed to the prevailing rule as set forth in the *Dunken* case.²⁰

SALES — LITERARY PROPERTY — IMPLIED WARRANTY

Plaintiff, purchaser of all rights in a story, sued for alleged breach of an express warranty of marketability of title after notice that a third party was claiming a portion of the proceeds of the sale. *Held*, that despite the use of the words "complete," "unconditional" and "unencumbered," describing the title, an express warranty was not created and a warranty of

13. See *Feller v. Equitable Life Assur. Soc'y of the United States*, 57 So.2d 581, 584 (Fla. 1952).

14. *Ibid.*

15. See *Home Ins. Co. v. Dick*, 281 U.S. 397, 406-407 (1930).

16. See *Hartford Acc. & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934) (statute of limitations); *Aetna Life Ins. Co. v. Dunken*, 266 U.S. 389 (1924) (penalty statute); *Bish v. Employers' Liability Assur. Corp. Ltd.*, 102 F. Supp. 343 (W.D. La. 1952) (direct action statute).

17. See *Hartford Acc. & Indemnity Co. v. Delta Pine Land Co.*, 292 U.S. 143, 150 (1934).

18. *Id.* at 149.

19. *Feller v. Equitable Life Assur. Soc'y of the United States*, 57 So.2d 581, 587 (Fla. 1952) (referring to *Aetna v. Dunken*, Thomas J., dissenting, said, "We are in no position to disagree when the Supreme Court of the United States has spoken on a matter involving the interpretation and application of the Constitution of the United States.").

20. *Cf.*, *Mutual Ben. Health & Acc. Ass'n. v. Bowman*, 96 F.2d 7, 10 (8th Cir. 1938) (where the court said, "While there are facts in this case not like those in *Aetna v. Dunken*, [cit. omitted], yet that case is controlling here because the facts leave no doubt that this policy is a contract made in New Mexico and, therefore not subject to the Nebraska statute allowing attorney's fees."

marketability of title will not be implied in a contract for the sale of personal property. *Loew's Inc. v. Wolff*, 101 F. Supp. 981 (S.D. Cal. 1951).

At common law there was no implied warranty of marketability of title in the sale of personal property,¹ and the Uniform Sales Act adopted by most of the states is notably silent on the subject.² The doctrine of implied warranty of marketability of title is found almost exclusively in the sale of real property. An agreement to sell realty is in reality an agreement to convey title to land,³ and in the absence of any provision to the contrary, the law implies an undertaking to convey a "marketable" title to the purchaser.⁴ A marketable title is a record title, clear on its face, and free from reasonable doubt as to matters of both fact and law.⁵ A purchaser of real property may rescind the contract of sale if there is a valid cloud on the record title.⁶

While the distinction between sales of real and personal property dates back to early common law, the reasons for the difference are still applicable today. It has long been the practice to record titles to real property.⁷ The courts can without difficulty search the records to see if the title is "marketable" and enforceable. Sales of personal property⁸ are not usually recorded and hence no objective test of the validity of the seller's title can be obtained. If a purchaser could claim the right to rescind for every interference or claim, whether it be just or unjust, there would be no assurance of finality in any sale of goods, and the courts would be powerless to enforce any contract for the sale of personalty.⁹

Literary property is personalty, and therefore the doctrine of implied warranty or marketability of title is not generally applied.¹⁰ Literary property rights are analagous to patent rights.¹¹ Both differ somewhat from

1. 1 WILLISTON, SALES § 217 (Rev. ed. 1948).

2. CAL. CIV. CODE § 1733 (1949); UNIFORM SALES ACT § 13.

3. See *Altschul v. O'Neil*, 35 Ore. 202, 203 (1899).

4. *Alabama Butane Gas Co. v. Torrant Land Co.*, 245 Ala. 500, 185 So.2d 91 (1944); *Oliver v. Poules*, 312 Mass. 188, 44 N.E.2d 1 (1942); *Rogers v. Gruber*, 351 Mo. 1033, 174 S.W.2d 830 (1943); *Stern v. Gepe Realty Corp.*, 289 N.Y. 274, 45 N.E.2d 440 (1942); *Burris v. Hastert*, 191 S.W.2d 811 (Tex. 1946); *Ackerman v. Carpenter*, 113 Vt. 77, 29 A.2d 922 (1942).

5. *Johnson v. Malone*, 252 Ala. 609, 42 So.2d 505 (1949); *Silvast v. Asplund*, 93 Mont. 584, 20 P.2d 631 (1933); *Northhouse v. Tortenson*, 146 Neb. 187, 19 N.W.2d 34 (1945); *Lund v. Emerson*, 204 S.W.2d 639 (Tex. 1947); *O'Meara v. Saunders*, 199 S.W.2d 689 (Tex. 1946).

6. *Lohmeyer v. Bower*, 170 Kan. 442, 227 P.2d 102 (1951); *Rudisale v. De Boughem*, 361 Mo. 917, 237 S.W.2d 166 (1951); *LaCourse v. Kiesel*, 366 Pa. 385, 77 A.2d 877 (1951).

7. *Phoenix Title and Trust Co. v. Old Dominion Co.*, 31 Ariz. 324, 253 Pac. 435 (1927).

8. *Gibson v. Stevens*, 8 How. 384 (U.S. 1850).

9. *Ibid.*

10. *Caliga v. Inter-Ocean Newspaper Co.*, 157 Fed. 186 (C.C.A. 7th Cir. 1907), *affirmed*, 215 U.S. 182 (1909) (same rules and benefits apply to literary property as personal); *Frohman v. Ferris*, 238 Ill. 430, 87 N.E. 327 (1909), *aff'd*, 23 U.S. 424 (1911). *Contra: Hollywood Plays Inc. v. Columbia Pictures Corp.*, 299 N.Y. 61, 85 N.E.2d 865 (1949) (purchaser may rescind if there is any doubt in the title offered—need not be bad in fact, if clouded by apparent defects or uncertainty).

11. *Consumers' Gas Co. v. American Electric Construction Co.*, 50 Fed. 778 (C.C.A.

ordinary goods in that they are products of the intellect and both are matters of public concern.¹² Nevertheless, they follow the rules applicable to personal property.¹³

The only implied warranties in the sale of personal property, both tangible and intangible are (1) that the seller has the power to sell, (2) that the buyer has the right to enjoy quiet possession and (3) that the goods are free at the time of sale from encumbrances in favor of a third person.¹⁴ A purchaser of personal property must show a paramount contrary title from which loss is certain to occur.¹⁵ He cannot rescind for mere doubt of, or cloud upon, the seller's title¹⁶ or even upon discovering an outstanding claim asserted by a third party.¹⁷ If he voluntarily yields to a third person, he does so at his own peril.¹⁸

Neither in the sale of real property, nor in the sale of personal property, is there any assurance that the buyer will be forever free from all unjust or illegal interference.¹⁹ The rights of the parties may differ, however, and the laws governing one may not be applicable to the other.²⁰ Thus the court properly refused to extend the doctrine of implied warranty of marketability of title to the sale of literary property.

TORTS—WORKMEN'S COMPENSATION—EXCLUSIVE REMEDY DOCTRINE

The plaintiff's wife, employed by the defendant, received an award under the New Jersey Workmen's Compensation Act.¹ The plaintiff, without his wife's joinder, then sued the defendant for loss of consortium. *Held*, affirming a summary judgment for the defendant,² the plaintiff's action was barred by the compensation act.³ *Danek v. Hommer*, 9 N.J. 64, 87 A.2d 5 (1952).

3rd Cir. 1892); *The Electron*, 74 Fed. 689 (C.C.A. 2d Cir. 1896); *Geist v. Stier*, 134 Pa. 216, 19 Atl. 505 (1890).

12. *Herzog v. Heyman*, 151 N.Y. 587, 45 N.E. 1127 (1897).

13. *Consumers' Gas Co. v. American Electric Construction Co.*, 50 Fed. 788 (C.C.A. 3rd Cir. 1892) (no defense if third party threatens suit); *Herzog v. Heyman*, 151 N.Y. 587, 45 N.E. 1127 (1897) (can rescind only after reasonable defense).

14. CAL. CIV. CODE § 1733 (1949); UNIFORM SALES ACT § 13.

15. *Barasch v. Kramer*, 62 Misc. 475, 115 N.Y. Supp. 176 (Sup. Ct. 1909).

16. *Hall v. Cochrane*, 24 Colo. App. 528, 135 Pac. 980 (1913); *Duke v. California Investment Co.*, 132 Wash. 32, 231 Pac. 20 (1924); *Contra: Hollywood Plays Inc. v. Columbia Pictures Corp.*, 299 N.Y. 61, 85 N.E. 865 (1949).

17. *Jones v. Hood*, 46 S.W. 71 (Tex. 1898).

18. *Courtney v. Gordon*, 74 Mont. 408, 241 Pac. 233 (1925).

19. *Wilson v. Calvert*, 96 F. Supp. 597 (D. Ariz. 1951) (vendor of realty can only be expected to give good or marketable title); *Rife v. Lybarger*, 49 Ohio 422, 31 N.E. 768 (1892).

20. *Gibson v. Stevens*, 8 How. 384 (U.S. 1850).

1. N.J. REV. STAT. § 34:15-1 *et seq.* (1937).

2. *Danek v. Hommer*, 14 N.J. Super. 607, 82 A.2d 659 (County Ct. 1951).

3. "Such agreements shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof . . . , and